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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-513

LEONARD L. CAPPETTO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 502 F. 2d 1351.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1974. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on October 1, 1974 (Pet. App. B). The petition for a writ of certiorari was filed on October 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an action for an injunction and other civil relief under the anti-racketeering statute (18 U.S.C. 1961, *et. seq.*), a defendant is entitled to the procedural rights of a defendant in a criminal case.

2. Whether a showing of special circumstances necessitating equitable intervention is a prerequisite to the granting of civil relief under 18 U.S.C. 1964.

3. Whether 18 U.S.C. 1962(b) and (c), making it unlawful to acquire or conduct the affairs of an enterprise in commerce through a pattern of racketeering activity or through the collection of an unlawful debt, do not apply to a gambling business made unlawful by 18 U.S.C. 1955.

4. Whether 18 U.S.C. 1955 unconstitutionally exceeds the power of Congress to regulate commerce.

STATUTES INVOLVED

The pertinent statutes, 18 U.S.C. 1955 and 1961 through 1964, are set forth in Appendix D to the petition.

STATEMENT

The United States filed a complaint (Pet. App. E 37-46) in the United States District Court for the Northern District of Illinois, pursuant to 18 U.S.C. 1964, alleging in two counts that petitioners had acquired or maintained an interest in or control of an enterprise, and had conducted or participated in the conduct of the affairs of the enterprise, through a "pattern of racketeering activity" or through "collection of an unlawful debt," in violation of 18 U.S.C. 1962(b) and (c) (Pet. App. E 39-43). A third count alleged a conspiracy to commit the above acts, in violation of 18 U.S.C. 1962(d). The alleged pattern of

racketeering activity and collection of an unlawful debt were in connection with petitioners' participation on two or more occasions in an illegal gambling business, in violation of 18 U.S.C. 1955 (Pet. App. E 43-44).[1] The relief sought included preliminary and permanent injunctions restraining petitioners and those acting in concert with them from engaging in an illegal gambling operation; divestiture by petitioner Cappetto of his interest in a building; disclosure of the identities of persons acting in concert with petitioners in the gambling operation, including those known to the government only by nicknames; an order directing each petitioner to submit to the United States Attorney for a period of ten years sworn quarterly reports stating his current address, business, sources of income, and other information bearing on his compliance with the injunction requested; and such further relief as the court deemed just (Pet. App. E 44-46).

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[1] "Racketeering activity" is defined in 18 U.S.C. 1961(1); a "pattern of racketeering activity" is defined in 18 U.S.C. 1961(5) as requiring "at least two acts of racketeering activity * * *." An "unlawful debt" includes a debt "incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof * * *." 18 U.S.C. 1961(6).

Specifically, the complaint alleged that petitioners Corabi, Mikolajczak and Wilson used a building and a telephone located therein to conduct a gambling operation with the knowledge of the building owner, petitioner Cappetto; that petitioners Mantia, Musteikas and Pidone, along with others known to the government only by nicknames, placed wagers with Corabi, Mikolajczak and Wilson for persons other than themselves; that the operation had a gross revenue of over $2,000 in a single day and invoived five or more persons, in violation of Illinois law and 18 U.S.C. 1955 (Pet. App. E 38-43).

The district court denied petitioners' motion to dismiss the complaint and entered various discovery orders. Petitioners, relying on their Fifth Amendment privilege against self-incrimination, refused to comply with the discovery orders and, except for Corabi, refused even to appear for depositions. Corabi appeared but refused to be sworn or deposed despite an order granting him "use" immunity under 18 U.S.C. 6002 and 6003. The court then ordered (1) that, by reason of petitioners' refusals to comply with discovery orders, the material allegations of the complaint were taken as true, petitioners were adjudged in default, and a default judgment should be entered against them; (2) that petitioners be enjoined *pendente lite* from carrying on the gambling operation; and (3) that they be held in contempt and committed until they obeyed the discovery orders, execution of the commitment order to be stayed pending appeal (Pet. App. C 20-28).

The court of appeals, while noting that it was "premature to consider whether divestiture or a reporting requirement in any form would be appropriate in this case, because the District Court has not yet ruled on the requests for these kinds of relief" (Pet. App. A 11), affirmed the orders of the district court (Pet. App. A 1-12).

ARGUMENT

1. The petition raises a number of issues concerning the constitutionality and application of Sections 1955, 1962 and 1964, most of which are not properly before the Court at this time. Thus, petitioners' claims concerning the relief that might be granted against them in this case are premature, as the court of appeals noted (Pet. App. A 11), because the district court has not yet entered a final judgment granting any such relief.

In addition, petitioners' challenges to the validity of the underlying statutes were not properly before the court of appeals for definitive resolution, because the district court's orders denying petitioners' motion to dismiss and adjudging them in default were not appealable final judgments. See 28 U.S.C. 1291. Compare Fed. R. Civ. P. 54(b); 28 U.S.C. 1292(b).

Similarly, the district court's order holding petitioners in civil contempt for refusing to appear or testify at their depositions was also not properly before the court of appeals, this Court having held that orders imposing civil sanctions against a party for failing to comply with discovery orders are not directly appealable. *E.g.*, *Doyle* v. *London Guar. & Acc. Co.*, 204 U.S. 599; see *International Bus. Machs. Corp.* v. *United States*, 493 F. 2d 112, 115 (C.A. 2), certiorari denied, 416 U.S. 995; cf. *Fox* v. *Capital Co.*, 299 U.S. 105, 107-108.

Finally, while petitioners were entitled to appeal from the district court's order granting a preliminary injunction (see 28 U.S.C. 1292(a)(1)), the question before the court of appeals was limited, as would be the question before this Court, to whether the district court had abused its discretion. See, *e.g.*, *Brown* v. *Chote*, 411 U.S. 452, 457.

Accordingly, this case is not an appropriate one in which to consider the questions raised by petitioners. In any event, there is no conflict among the circuits concerning the validity and scope of the relatively new statutes in issue, and the court of appeals correctly rejected petitioners' contentions in a thorough opinion upon which we rely.

2. Petitioners' principal claim is that, because the facts that would warrant civil relief pursuant to Section 1964 would also constitute violation of a criminal statute (18 U.S.C. 1962 and 1963), they were entitled in this proceeding to all the procedural protections of a criminal case (Pet. 16-24). The court of appeals properly rejected this claim (Pet. App. A 5-8):

> Congress also has power to provide for civil injunctive relief against activities which adversely affect interstate commerce, and that power extends to activities which are made criminal by state or federal law. Long ago the Supreme Court, in the case of *In re Debs*, 158 U.S. 564 (1895), held that the commerce clause authorizes the federal government, through injunctive relief granted by its courts, to restrain or remove obstructions to interstate commerce * * *.
>
> * * * * *
>
> In the exercise of its authority to regulate commerce, Congress has also provided civil actions for injunction as alternatives to criminal actions in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 321-334, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135, *et seq.*, and the Meat Inspection Act, 21 U.S.C. §§ 674-676. Acting under other constitutional grants of authority, Congress has provided alternative civil and criminal remedies in the Internal Revenue Code, 26 U.S.C. §§ 7201, 7231, 7402; and the three emergency price control acts, the Emergency Price Control Act of 1942, 56 Stat. 26, the Defense Production Act of 1950, 50 App. U.S.C. § 2109, and the Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note.

Nothing in the Constitution prevents Congress from providing for both civil and criminal enforcement of a statute.

* * * * *

Defendants unsuccessfully attempt to distinguish what they refer to as "the federal anti-trust, pure food, and similar statutes." They argue that the civil proceedings provided for in those statutes, unlike those under Section 1964, are not designed as alternatives to criminal prosecution to serve when the requisite proofs are lacking. Neither, necessarily, is a proceeding under Section 1964, but the standard of proof is lower in a civil proceeding than it is in a criminal proceeding under any of the statutes we are considering. Defendants argue that the other statutes were designed to serve values "totally different from the purely criminal thrust of the Organized Crime Control Act." We see no basis in this distinction, if it is one, for circumscribing Congress' power to regulate activities affecting interstate commerce. Conduct adversely affecting interstate commerce which is of a kind that is traditionally proscribed under criminal statutes, state or federal, does not enjoy a special immunity from regulation through civil proceedings, as the Supreme Court pointed out in the *Debs* case.

This is not a case in which the procedure "though technically a civil proceeding, is in substance and effect a criminal one," as was *Boyd* v. *United States*, 116 U.S. 616, 634 (1886), on which defendants rely heavily. *Boyd* was expressly distinguished in *Debs, supra* (158 U.S. at 594) * * *. Similarly, *In re Gault*, 387 U.S. 1 (1967) and *In re Winship*, 397 U.S. 358 (1970), relied upon by defendants, in-

volved juvenile proceedings which were civil in name but in which sanctions of a criminal nature were imposed. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 696-698 (1965) and *United States* v. *U.S. Coin & Currency Co.*, 401 U.S. 715 (1971), also relied upon by defendants, involved forfeitures. No forfeiture is provided for in Section 1964 or sought by the government in this proceeding.

Section 1964 provides for a civil action in which only equitable relief can be granted. The relief authorized by that section is remedial not punitive and is of a type traditionally granted by courts of equity. It is the same kind of equitable relief that federal courts have been granting for generations in civil actions under Section 4 of the Sherman Act and Section 15 of the Clayton Act, 15 U.S.C. §§ 4 and 25.

With particular reference to the contempt orders, the court of appeals properly held (*id.* at A 11-12):

Since this was a civil proceeding, plaintiff was entitled to discovery as in any other civil case, and the court had the authority granted by the Federal Rules of Civil Procedure to enter appropriate discovery orders and to enforce those orders. Defendants have no more right to refuse to be sworn or to refuse to submit to questioning than any other party in a civil case. A defendant of course has the right under the Fifth Amendment to refuse to answer a specific question on the ground that the answer may tend to incriminate him. This right disappears, however, if use immunity is granted under 18 U.S.C. §§ 6002 and 6003, as it was to defendant Corabi. The immunity granted is coextensive with the privilege against self-incrimination, *Kastigar* v. *United States*, 406 U.S. 441,

461 (1972), and therefore may be invoked only against criminal proceedings. Accordingly, testimony given by a party in a civil case under a grant of immunity may be used against that party in that case, although it cannot be used in any criminal proceeding against him. When Corabi refused to testify despite the grant of immunity, and when the other defendants refused to obey the court's order to appear for depositions, they were in contempt and subject to sanctions under Rule 37, F. R. Civ. P. The District Court had authority to declare them in default and also had authority to hold them in contempt and to order them committed until they purged themselves of the contempts.

3. Petitioners contend that Section 1964 is unconstitutionally vague unless it is construed as limiting equitable relief to cases involving irreparable injury or other unusual circumstances (Pet. 29-36). Although that claim is largely premature, it was properly rejected by the court of appeals (Pet. App. A 8-9, 10-11):

> * * * Section 1964 * * *, like Section 4 of the Sherman Act, is merely a specific grant of jurisdiction to enforce the substantive provisions of the statute by injunction. The kinds of activity to which the injunction may be addressed are described with sufficient particularity in those substantive provisions, Section 1955 and Section 1962. Defendants do not argue that either of these sections is unconstitutionally vague. Nor do they question that the alleged gambling activities are covered by Section 1955. * * *
>
> The conditions under which an injunction will be issued pursuant to Section 1964 are determinable from the principles that govern the granting of equitable relief. [Citations omitted.] Whether equitable relief is

> appropriate depends, as it does in other cases in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future, a likelihood which is frequently established by inferences drawn from past conduct.
>
> * * * * *
>
> We need not decide the academic question of whether, in the absence of Section 1964, such a showing would be necessary. It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962. It is also obvious that Congress did not intend to require a showing of inadequacy of the remedy at law. If, as defendants contend, the existence of the criminal remedy at law under Section 1963 would defeat an action in equity under Section 1964, the latter section would be a nullity.

4. Petitioners' contention that Sections 1962 and 1964 are applicable only to infiltration of otherwise legitimate business (Pet. 25-28) was likewise properly rejected by the court of appeals (Pet. App. A 9-10):

> Both the statutory language and the legislative history, however, support the government's contrary interpretation of the Act. While one of Congress' targets was "the infiltration of legitimate organizations by organized crime" (Sen. Rep. 91-617, p. 80 (1969)), and subsection (a) of Section 1962 is aimed at that target, Congress also intended to prohibit any pattern of racketeering activity in or affecting commerce; and subsections (b) and (c) of Section 1962 specifically prohibit such activity. Subsection

> (b) forbids acquiring or maintaining an interest in an enterprise which affects commerce through a pattern of racketeering activity or through collection of an unlawful debt; and subsection (c) forbids participation in the affairs of such an enterprise through those means. That Congress intended to give the term "enterprise" a very broad meaning is recognized in a recent Second Circuit case. *United States* v. *Parness*, [503 F. 2d 430 (C.A. 2), certiorari denied, No. 74-274, January 13, 1975] * * *. There is nothing in the language of subsection (b) or (c) or in the definition section of the Act, Section 1961, to suggest that the enterprise must be a legitimate one.

5. Finally, the court of appeals also properly rejected petitioners' contention (Pet. 36-40) that Section 1955 unconstitutionally exceeds Congress' power to regulate commerce (Pet. App. A 4-5):

> The power of Congress to prohibit activities made unlawful by state law which take place in, or affect, interstate commerce has long been settled. *Caminetti* v. *United States*, 242 U.S. 470 (1917); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). The Supreme Court has upheld the federal loanshark statute (18 U.S.C. § 891) against a challenge similar to the one made by defendants here. *Perez* v. *United States*, 402 U.S. 146 (1971). This court and other courts of appeals have held that Section 1955 is authorized by the commerce clause. [Citations omitted.] These cases demonstrate that Congress had power to determine that the class of activities described in Section 1955 adversely affects interstate commerce and, based upon that finding, to prohibit those activities. It is also settled, on the authority of

Perez, that the statute is valid "even when applied to individual members of the class whose own activities may not have any demonstrable impact on interstate commerce." * * * [Citing *United States* v. *Hunter*, 478 F.2d 1019, 1021 (C.A. 7), certiorari denied, 414 U.S. 857; *Schneider* v. *United States*, 459 F. 2d 540, 541 (C.A. 8), certiorari denied, 409 U.S. 877; *United States* v. *Becker*, 461 F. 2d 230, 233-234 (C.A. 2).]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1975.